No. 17-204

IN THE

Supreme Court of the United States

APPLE INC.,

Petitioner,

v.

ROBERT PEPPER, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether consumers may seek treble damages under § 4 of the Clayton Act from anyone who delivers goods to them, even if they seek damages based on prices set by third parties who would be the immediate victims of any alleged antitrust offense.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 8

I. CONGRESS HAS RATIFIED THE DIRECT-PURCHASER RULE VIA FOUR DECADES OF LEGISLATIVE ACQUIESCENCE 8

A. Congress Has Steadfastly Refused to Alter or Repeal the Direct-Purchaser Rule 9

B. Since *Illinois Brick*, Congress Has Twice Amended § 4 of the Clayton Act, Without Giving Indirect Purchasers Standing to Sue 14

II. THE MERITLESSNESS OF THIS LAWSUIT—AND THE ABSENCE OF A LAWSUIT BY APP DEVELOPERS—CONFIRMS THE WISDOM OF *ILLINOIS BRICK* 17

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases:

Apex Hosiery Co. v. Leader,
310 U.S. 469 (1940) 14, 16

Arizona v. Rumsey,
467 U.S. 203 (1984) 17

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 1

Bob Jones Univ. v. United States,
461 U.S. 574 (1983) 14, 17

Faragher v. City of Boca Raton,
524 U.S. 775 (1998) 9

Flood v. Kuhn,
407 U.S. 258 (1972) 8, 13, 14

Forest Grove School Dist. v. T.A.,
557 U.S. 230 (2009) 15

FTC v. Actavis,
570 U.S. 136 (2013) 1

Gen. Dynamics Land Sys., Inc. v. Cline,
540 U.S. 581 (2004) 6

Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968) ... 4, 5, 12, 13, 17

Page(s)

Illinois Brick Co. v. Illinois,
431 U.S. 720 (1977) ..... *passim*

Kansas v. Utilicorp United, Inc.,
497 U.S. 199 (1990) 1, 11, 12

Lorillard v. Pons,
434 U.S. 575 (1978) 8

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 8

Pfizer, Inc. v. Government of India,
434 U.S. 308 (1978) 15, 16

Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Proj., Inc.,
135 S. Ct. 2507 (2015) 17

Texas Indus., Inc. v. Radcliff Materials, Inc.,
451 U.S. 630 (1981) 8

Statutes:

Antitrust Modernization Commission Act
Pub. L. No. 107-273, 116 Stat. 1856 (2002) 12

Antitrust Procedural Improvements Act
Pub. L. 96-349, 94 Stat. 1156 (1980) 15

Foreign Sovereign Antitrust Recoveries Act
Pub. L. 97-393, 96 Stat. 1964 (1982) 16

15 U.S.C. § 15(a) ..... *passim*

Page(s)

15 U.S.C. § 15a 16

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H.R. 2060, 96th Cong. (1979) 11

H.R. 2204 96th Cong. (1979) 11

H.R. 2244, 98th Cong. (1983) 11

H.R. 4321, 106th Cong. (2000) 12

Page(s)

H.R. 8359, 95th Cong. (1977) 10

H.R. 8516, 95th Cong. (1977) 10

H.R. 8517, 95th Cong. (1977) 10

H.R. 9132, 95th Cong. (1977) 10

H.R. 10783, 95th Cong. (1978) 10

H.R. 11942, 95th Cong. (1978) 10

H.R. Rep. No. 97-476 (1982) 16

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S. 300, 96th Cong. (1979) 11

S. 915, 98th Cong. (1983) 11

Page(s)

S. 1874, 95th Cong. (1977) 10

S. 1962, 100th Cong. (1987) 11

S. 2022, 99th Cong. (1986) 11

S. 2481, 99th Cong. (1986) 11

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INTEREST OF *AMICUS CURIAE*[1]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF promotes and defends free enterprise, individual rights, limited government, and the rule of law. Since its founding in 1977, WLF has often appeared as an *amicus curiae* in important antitrust cases. *See, e.g.*, *FTC v. Actavis*, 570 U.S. 136 (2013); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990).

The central aim of antitrust law is to ensure free-market competition, providing consumers with better goods and services at lower prices. WLF believes that the decision below erodes, rather than furthers, that vital aim. By holding that the plaintiffs may seek damages under § 4 of the Clayton Act simply because Apple "functions" as a "distributor," the Ninth Circuit has paved the way for both direct and indirect purchasers to recover treble damages for the same alleged antitrust violation.

That potential for double recovery upends the business community's long and reasonable reliance on *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which holds that only the direct purchaser of a good or service may sue an allegedly abusive monopolist for damages. If affirmed, the Ninth Circuit's holding

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[1] No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, helped pay for the preparation or submission of this brief. All parties have consented to the filing of WLF's brief.

will unduly complicate federal antitrust litigation by requiring courts to undertake the famously difficult task of calculating "pass-on" antitrust damages. Not only would that result flout this Court's direct-purchaser rule, but it would drastically increase firms' exposure to duplicative antitrust suits and recoveries.

STATEMENT OF THE CASE

After introducing its popular iPhone in 2007, Apple launched the App Store in 2008. Pet. App. 2a. The App Store is a digital marketplace that allows iPhone users to download software applications, or "apps," for use on the iPhone. *Ibid.* Apple's patented iPhone operating system, iOS, allows users to download apps only from the App Store. *Id.* at 49a.

Independent software developers create most of the App Store's apps. Pet. App. 2a. These third-party developers have released more than two million apps for the iPhone. Br. of Pet'r 9. An app's developer sets the app's price, if any; most apps are free. Pet. App. 2a. Besides hosting the App Store, Apple also reviews apps for security and compatibility and—as the app developer's agent—collects any purchase price from the buyer and then delivers the app. *Ibid.* Apple charges the developer a 30% commission on each app sold; free apps yield no commission. *Id.* at 3a. When a user buys an app from the App Store, Apple retains its 30% commission from the sale price and remits the balance to the developer. *Ibid.*

The plaintiffs are iPhone users who bought apps through the App Store. Pet. App. 46a. In a

putative class action, they allege that Apple violated § 2 of the Sherman Act by abusing a monopoly on the "aftermarket" for iPhone apps. *Id.* at 3a. They also allege that Apple's supracompetitive 30% commission caused them to pay more for their iPhone apps than they should have paid. *Id.* at 53a. Under § 4 of the Clayton Act, the plaintiffs seek to recover treble the amount of every alleged overcharge. *Id.* at 63a.

On Apple's motion, the district court dismissed the operative complaint, with prejudice, for the plaintiffs' lack of direct-purchaser standing. Pet. App. 23a-37a. The court "fairly read" the complaint as challenging a "fee created by agreement and borne by the developers to pay Apple 30% from their own proceeds—an amount which is passed on to the consumers as part of their purchase price." *Id.* at 36a. Since the plaintiffs allege no facts suggesting that they purchased apps directly from Apple, the district court found their § 4 claim barred under *Illinois Brick*'s direct-purchaser rule. *Id.* at 36a-37a.

The Ninth Circuit reversed. Pet. App. 1a-22a. Departing from *Illinois Brick*'s analysis, the appeals court found it immaterial that Apple, acting as an agent, "forwards the payment" from iPhone users "to the app developers." *Id.* at 20a. Equally irrelevant was that the app developer "sets [the] price" for its apps. *Id.* at 21a. The panel thus failed to consider whether the plaintiffs' § 4 claim rests on the very pass-on theory of antitrust liability that *Illinois Brick* forecloses.

The Ninth Circuit also ignored that, as direct purchasers of the App Store's distribution services, tens of thousands of third-party app developers would have standing to assert their own § 4 claims against Apple for the same alleged violation. Pet. App. 20a. But according to the panel, "whether app developers are direct purchasers of distribution services from Apple in the sense of *Illinois Brick* makes no difference to our analysis." *Ibid.*

In the Ninth Circuit's view, "the function Apple serves rather than the manner in which it receives compensation for performing that function" was the "key" to deciding the case. Pet. App. 20a-21a. Since Apple "distributes" iPhone apps to the App Store's consumers, the panel reasoned, iPhone users are "direct purchasers of iPhone apps from Apple." *Ibid.* As "direct purchasers," the court held, the plaintiffs could bring a § 4 claim despite *Illinois Brick*. *Ibid.*

SUMMARY OF ARGUMENT

Forty-one years ago, in *Illinois Brick Co. v. Illinois*, this Court announced a bright-line rule barring indirect purchasers from suing to recover alleged overcharges passed on to them through a distribution chain. Ever since, only a direct purchaser may sue to recover federal antitrust damages—even if that purchaser passed the alleged overcharge to its customers.

Illinois Brick flowed logically from *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), which held that a defendant can't reduce

its exposure to antitrust damages under § 4 simply by showing that the plaintiff passed some of its overcharge damages to an indirect purchaser. Taken together, *Hanover Shoe* and *Illinois Brick* establish that "the overcharged direct purchaser, and not others in the chain of manufacture or distribution," is the "person * * * injured in his business or property" under § 4 of the Clayton Act. *Illinois Brick*, 431 U.S. at 729; 15 U.S.C. § 15(a).

That rule is dispositive here. As the Petitioner has shown, the plaintiffs' § 4 claim hinges on precisely the sort of "pass through" theory of harm that *Illinois Brick* prohibits. "In fact, it depends on conducting a prohibited pass-through analysis millions of times, because the required economic analysis must be undertaken app-by-app and Respondents have styled their claim as a class action covering all United States purchasers of all iPhone apps." Br. of Pet'r 18.

But the Ninth Circuit disagrees. In the face of this Court's decisions, the panel below held that anyone who buys a good or service may, under § 4, sue anyone who delivered it. In so holding, the appeals court adopted the outcome favored by Justice Brennan's dissent in *Illinois Brick*: "[I]t is irrelevant to whom damages are paid, so long as someone redresses the violation." 431 U.S. at 760 (Brennan, J., dissenting). As Judge Fletcher, who authored the panel's opinion, announced at oral argument, "I think Justice Brennan got it right in *Illinois Brick*." CA9 Oral Argument at 4:20, *Pepper v. Apple Inc.*, No. 14-15000 (Feb. 10, 2016).

Stare decisis demands more—especially here. As *Illinois Brick* emphasized, Congress is always free to legislate away this Court's interpretation of § 4 if it disagrees with it. Yet Congress has never done so. In the four decades since the Court decided *Illinois Brick*, no fewer than 17 bills have sought to repeal the direct-purchaser rule. None of those bills has garnered so much as a floor vote in either chamber of Congress. Such "congressional silence, after years of judicial interpretation, supports adherence to the traditional view." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 594 (2004).

Nor is that all. While Congress has amended the Clayton Act many times during the same interval, it has never altered or repealed the "any person * * * injured in his business or property" language from which this Court's direct-purchaser rule derives. What's more, Congress has twice amended § 4 itself, in 1980 and 1982, at the height of a "repeal-*Illinois-Brick*" frenzy. And the last of those amendments—the Foreign Sovereign Antitrust Recoveries Act of 1982—expressly overturned another of this Court's decisions construing the very statutory language at issue in *Illinois Brick*.

Yet in both amendments, Congress fully retained the statutory basis for the direct-purchaser rule. Under this Court's case law, those amendments give *Illinois Brick* special precedential force. While legislative inaction by Congress doesn't always equal acquiescence, Congress's long history of inaction here, combined with its deliberate amendments to § 4 of the Clayton Act, show decisively that Congress has ratified the direct-purchaser rule.

While it is good to adhere to settled law, it is even better to adhere to settled law that works. Many companies have crafted their entire business model around selling apps through the App Store. These companies—and all other app developers—have skin in the game. They are highly motivated to sue if they think they are suffering from abusive app distribution. They are also highly motivated *not* to sue if they are profiting from efficient app distribution. Consumers do not share these incentives. How Apple distributes apps is of little consequence to their lives (and of *no* consequence to their livelihoods). *Illinois Brick*'s direct-purchaser rule properly concentrates the power to sue in the app developers rather than in the consumers.

In all events, the underlying Sherman Act claim here is blatantly meritless. Apple is not a monopolist; it has no power to exploit app developers. No, the App Store is the free market at its best: Apple, app developers, and consumers all engage in voluntary transactions, and everyone benefits. And the lack of a lawsuit from app developers confirms as much. The presence of this lawsuit, meanwhile, confirms merely that plaintiffs' lawyers and plaintiffs with no skin in the game will use any opening to bring a strike suit. Not only has the direct-purchaser rule proven efficient, as this case shows, but—especially given the innovative nature of the digital economy—it is more relevant now than ever before.

ARGUMENT

I. CONGRESS HAS RATIFIED THE DIRECT-PURCHASER RULE VIA FOUR DECADES OF LEGISLATIVE ACQUIESCENCE.

Stare decisis has "special force in the area of statutory construction" where "Congress remains free to alter" what this Court has done. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989). Even in antitrust, where Congress has given the federal courts the power to develop common law defining "substantive violations," nothing "suggest[s] that Congress intended courts to have the power to alter or supplement the remedies enacted." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 645 (1981).

In *Illinois Brick*, the Court explicitly invited Congress, "[s]hould [it] disagree with this result," to "amend the [Clayton Act] to change it." 431 U.S. at 735 n.14. Yet for more than 40 years, Congress has never done so. Instead, ever since *Illinois Brick*, Congress has steadfastly rejected a host of legislative proposals to repeal it. Given this "positive inaction," Congress has shown that it agrees with the Court's construction of § 4. *Cf. Flood v. Kuhn*, 407 U.S. 258, 283 (1972).

At the same time, because Congress is presumed to know of this Court's construction of statutory language, it "adopt[s] that interpretation when it re-enacts a statute without chang[ing it]." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Here, not only has Congress repeatedly amended the Clayton Act, but it has twice amended § 4 itself, retaining the

very language at issue in *Illinois Brick*. Those amendments give *Illinois Brick* extra precedential force. *See, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998) ("[T]he force of precedent here is enhanced by Congress's amendment to the [relevant statute] since [this Court's] decision, without providing any modification of our holding.").

A. Congress Has Steadfastly Refused to Alter or Repeal the Direct-Purchaser Rule.

Grounded in common-law principles favoring direct over indirect damages claims and shunning duplicative recoveries, the direct-purchaser rule reflects the Court's desire to avoid the inherently difficult task of apportioning antitrust damages. It also furthers the aim of antitrust deterrence. By concentrating the potential recovery—and thus the incentive to sue—solely in direct purchasers, the rule optimizes the deterrent effect of § 4's treble damages remedy. "[O]n balance, and until there are clear directions from Congress to the contrary," the direct-purchaser rule best furthers "the legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws under § 4." *Illinois Brick*, 431 U.S. at 746.

In inviting Congress to enact a different rule if it disagreed, the Court doubtless was aware of the controversy *Illinois Brick*'s direct-purchaser rule would generate. In light of the strong opinions (for and against) that the rule has evoked ever since, Congress's refusal to repeal *Illinois Brick* can't be dismissed as mere inadvertence or indifference. Nor has there been a shortage of lobbying efforts to give

indirect purchasers standing to sue under § 4. On the contrary, *Illinois Brick* "generated a firestorm of criticism from the day it was decided." Edward D. Cavanaugh, Illinois Brick*: A Look Back and a Look Ahead*, 17 Loy. Consumer L. Rev. 1, 18 (2004).

Within days of the decision, a coalition of state attorneys-general circulated a bill, the "sole purpose" of which was "to overrule *Illinois Brick* directly and nothing else." *Coalition Prepares Possible Legislation to Overrule* Illinois Brick *in Congress*, Antitrust & Trade Reg. Rep. (BNA) No. 820, at A-16 (June 30, 1977). The American Bar Association quickly assembled a task force devoted to undoing *Illinois Brick*'s direct-purchaser rule. This "Task Force did not assess the desirability of a legislative reversal * * * but rather proceeded on the assumption that such legislation * * * would be passed." Josef D. Cooper & David L. Foster, *Report of the American Bar Ass'n Antitrust Law Section Task Force on Legislative Alternatives Concerning* Illinois Brick Co. v. Illinois, 46 Antitrust L.J. 1137, 1141 (1978).

Members of Congress, too, responded with a flurry of bills to abrogate *Illinois Brick*. *See* H.R. 11942, 95th Cong. (1978); H.R. 10783, 95th Cong. (1978); S. 1874, 95th Cong. (1977); H.R. 9132, 95th Cong. (1977); H.R. 8517, 95th Cong. (1977); H.R. 8516, 95th Cong. (1977); H.R. 8359, 95th Cong. (1977). "While the formulations of the different bills varied widely, the primary thrust of the proposals was to repeal the *Illinois Brick* holding by making it clear that indirect purchasers whose business or property is injured by reason of an antitrust violation shall be entitled to sue for treble damages under § 4 of the Clayton Act." Edward D.

Cavanaugh, *The* Illinois Brick *Dilemma: Is There a Legislative Solution?*, 48 Alb. L. Rev. 273, 274 n.10 (1984).

Though Congress held "extensive hearings" on each of these bills in both the House and Senate, none made it out of committee in either chamber; all eventually died. *Id.* at 274-75. Similar efforts to repeal *Illinois Brick* failed in the 96th Congress,[2] in the 97th Congress,[3] in the 98th Congress,[4] and so on.[5] But despite a ten-year crusade for legislative repeal, opponents of *Illinois Brick* simply couldn't persuade Congress that this Court's direct-purchaser rule was, on balance, bad antitrust policy.

After these persistent but unsuccessful lobbying efforts, the controversy over the direct-purchaser rule lay mostly dormant until 1990, when this Court reaffirmed the rule. *Kansas v. Utilicorp United, Inc.* asked the Court to decide who may sue "when, in violation of the antitrust laws, suppliers overcharge a public utility for natural gas and the utility passes on the overcharge to its customers." 497 U.S. at 204. In refusing to carve out a pass-through exception for states suing as *parens patriae*, the Court explained: "Having stated the rule in

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[2] *See* S. 300, 96th Cong. (1979); H.R. 2204 96th Cong. (1979); H.R. 2060, 96th Cong. (1979).

[3] *See* S. 2772, 97th Cong. (1982).

[4] *See* S. 915, 98th Cong. (1983); H.R. 2244, 98th Cong. (1983).

[5] *See* S. 1962, 100th Cong. (1987); S. 2481, 99th Cong. (1986); S. 2022, 99th Cong. (1986).

Hanover Shoe, and adhered to it in *Illinois Brick*, we stand by our interpretation of § 4." *Id.* at 217.

Despite *Utilicorp*, it wouldn't be until 2000 that another *Illinois Brick* "repealer" bill appeared in Congress. *See* H.R. 4321, 106th Cong. (2000). Like its predecessors, the proposed Antitrust Enforcement Improvement Act sought to amend § 4 of the Clayton Act to allow any "indirect purchaser in the chain of manufacture, production, or distribution of goods or services" to sue for damages. *Ibid.* And like its predecessors, the bill went nowhere. After being referred for hearings to the House's Judiciary and Agriculture Committees, it died for lack of support. *Ibid.*

In 2002, Congress created the Antitrust Modernization Commission "to examine whether the need exists to modernize the antitrust laws and to identify and study related issues." Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, 116 Stat. 1856, 1856 (2002). While Congress had authorized similar commissions in the past, this was the first one to be convened after *Hanover Shoe* and *Illinois Brick*. The Commission submitted its final report and recommendations to Congress in 2007. *See* Antitrust Modernization Commission, Report and Recommendations (2007), https://govinfo.library.unt.edu.amc/report_recommendation/amc_final_report.pdf.

The final report noted that "[v]igorous debate over whether to allow only direct, or both direct and indirect, purchasers to seek antitrust damages has continued for almost thirty years." *Id.* at 266. The Commissioners divided over "whether the deterrence

of antitrust violations is best achieved by limiting recoveries to direct purchasers or permitting indirect purchasers to sue as well." *Id.* at 273. But in the end, the Commission urged Congress to "[o]verrule *Illinois Brick* and *Hanover Shoe* to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages from violations of federal antitrust law." *Id.* at 267.

As antitrust scholar William Page presciently noted at the time, "Congress has shown no signs that it will adopt these recommendations." William H. Page, *Class Interpleader: The Antitrust Modernization Commission's Recommendation to Overrule* Illinois Brick, 53 The Antitrust Bull. 725, 726 (2008). Nor *should* Congress adopt the Commission's proposal, Page argued, "for two primary reasons." *Id.* at 744. First, "a pure direct purchaser regime would produce the most efficient means of imposing a deterrent penalty equal to three times the overcharge." *Ibid.* And second, "even if compensation is an appropriate goal, indirect purchaser suits will not achieve it." *Ibid.*

Eleven years later, it hardly needs saying that the Commission's recommendation to repeal the direct-purchaser rule was a legislative non-starter; it failed even to produce a single bill. That is, Congress created and funded a special commission to suggest improvements in federal antitrust law. Then, after five years of study and deliberation, that commission urged (among other things) amending the Clayton Act to give indirect purchasers § 4 standing to sue. But Congress has flatly refused to do so. "If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to

be remedied by the Congress, and not this Court." *Flood*, 407 U.S. at 284.

* * *

From almost the day *Illinois Brick* was decided, Congress has been urged repeatedly to amend § 4 to permit indirect purchasers to seek antitrust damages. But nothing has come of any of those efforts. This steadfast refusal to repeal the direct-purchaser rule, in the face of dogged and persistent efforts to do so, is unusually strong evidence of congressional intent. In other words, "the matter has been fully brought to the attention of the public and the Congress," and "the latter has not seen fit to change the statute." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488-89 (1940).

B. Since *Illinois Brick*, Congress Has Twice Amended § 4 of the Clayton Act, Without Giving Indirect Purchasers Standing to Sue.

Congress has not been shy about amending the Clayton Act; it has done so more than two dozen times over the past four decades. More telling still, Congress has amended § 4 itself, twice, since *Illinois Brick*. And the last time it did so, it expressly overruled another of this Court's constructions of § 4. Yet Congress has never changed—much less repealed—*Illinois Brick*'s direct-purchaser rule. By amending § 4 while refusing to give indirect purchasers standing to seek treble damages, Congress has gone "well beyond" the mere failure "to act on legislative proposals." *Bob Jones Univ. v. United States*, 461 U.S. 574, 601 (1983).

Since Congress knows how to abrogate this Court's statutory constructions if it wants to, when "a word or phrase has been authoritatively interpreted by the highest court in a jurisdiction," then a "later version of [the same law] perpetuating the wording is presumed to carry forward that interpretation." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012); *see Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 244 n.11 (2009) ("When Congress amended [the Act] without altering the text of [the relevant provision], it implicitly adopted [this Court's] construction of the statute."). That canon controls here.

In 1980, Congress enacted the Antitrust Procedural Improvements Act. *See* Pub. L. 96-349, 94 Stat. 1156 (1980). Among other things, the new law amended § 4(a) of the Clayton Act to provide for the recovery of prejudgment interest. *Ibid.* At the same time, it left intact the "any person * * * injured in his business or property" language construed only three years earlier in *Illinois Brick*. And despite the well-documented debate underway at the time, nothing in the 1980 amendment addressed direct or indirect purchasers; nor did it alter, in any way, standing to sue under § 4. *Ibid.*

Two years later, Congress enacted another amendment to § 4—this time, in direct response to one of this Court's decisions. In *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 313-14 (1978), the Court decided that "Congress did not intend to make the treble-damages remedy available only to consumers in our own country." Construing the very statutory language at issue in *Illinois Brick*, *Pfizer*

held that foreign governments are "persons" who may sue under § 4 to recover treble damages for injuries caused by antitrust violations. *Ibid.*

But Congress disagreed. After all, § 4a of the Clayton Act expressly limits the federal government's antitrust recovery to "actual damages." *See* 15 U.S.C. § 15a. And yet *Pfizer* gave foreign governments a more potent remedy than the United States enjoys for punishing violations of its own antitrust laws. That jarring disparity prompted a vigorous debate in both houses of Congress. *See* H.R. Rep. No. 97-476 (1982); S. Rep. No. 97-78 (1981).

So in 1982, Congress again amended § 4 of the Clayton Act. *See* Pub. L. 97-393, 96 Stat. 1964 (1982). The Foreign Sovereign Antitrust Recoveries Act of 1982, also known as the "Pfizer Act," explicitly abrogated *Pfizer*'s holding by limiting a foreign state's recovery to actual, rather than treble, damages. *Ibid.* Yet again, Congress preserved the "any person" wording that provided the statutory basis for *Illinois Brick*'s direct-purchaser rule. *Ibid.* And yet again, Congress opted not to grant indirect purchasers standing to sue under § 4. *Ibid.* Nor has it ever done so.

Of course, when it twice amended § 4 in the aftermath of *Illinois Brick*, Congress was well aware of this Court's direct-purchaser rule. Indeed, a debate was still raging over whether Congress intended § 4 to limit standing only to direct purchasers. That multi-year debate "brought forth sharply conflicting views, both on the Court and in Congress." *Apex Hosiery*, 310 U.S. at 488. And amid that debate, Congress "made a considered judgment

to retain the relevant statutory text." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Proj., Inc.*, 135 S. Ct. 2507, 2519 (2015). The historical record is clear: Congress has ratified the rule of *Hanover Shoe* and *Illinois Brick*.

* * *

While it is true that "any departure" from *stare decisis* "demands special justification," *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984), *stare decisis* has special force here. For more than 40 years, Congress has made a clear (though, of course, not irrevocable) decision to embrace *Hanover Shoe* and *Illinois Brick*. In all that time, Congress has never concluded that any proposed change would yield, on balance, a better result for antitrust enforcement than this Court's direct-purchaser rule.

Along with Congress's repeated refusal to adopt proposed repeals of *Illinois Brick*, its § 4 amendments manifest "an unusually strong case of legislative acquiescence in and ratification by implication of" the direct-purchaser rule. *Bob Jones Univ.*, 461 U.S. at 599.

II. THE MERITLESSNESS OF THIS LAWSUIT—AND THE ABSENCE OF A LAWSUIT BY APP DEVELOPERS—CONFIRMS THE WISDOM OF *ILLINOIS BRICK*.

The merits of this lawsuit are not before the Court. Still, this lawsuit's utter lack of merit is relevant to the question presented. *Illinois Brick* posits that the direct purchaser is best situated to sue an abusive monopolist. Since they transact with

the violator, direct purchasers are better positioned than indirect purchasers to detect the violator's anticompetitive practices. *See* William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of* Illinois Brick, 46 U. Chi. L. Rev. 602, 609 (1979).

What's more, direct purchasers (normally suppliers or distributors) are usually less numerous and more concentrated than indirect purchasers (normally retail consumers). So direct purchasers' antitrust lawsuits will less often be diffuse class actions with high administrative costs and little recovery for the class itself. *Id.* at 607.

Above all, direct purchasers have the most incentive to sue only for conduct that is in fact anticompetitive. That is because a supplier or distributor is the monopolist's bulk purchaser. If the monopolist's conduct is efficient, the supplier or distributor stands to lose a great deal by trying to kill that efficiency through an antitrust lawsuit. In contrast, a consumer stands to lose little or—if the product is something she will buy only once—nothing by filing a baseless suit.

Contrary to the plaintiffs' claim, the anticompetitive practice they allege would harm app developers most. A monopoly rent is by definition a supracompetitive charge that lowers demand for a product. If Apple's 30% commission were in fact supracompetitive, the arrangement between app developers and Apple would be such that (1) Apple ensures that apps sell at a monopoly price, (2) Apple collects the entirety of the resulting monopoly rent,

and (3) the monopoly price results in fewer apps sold by app developers. If this were true, the app developers would be getting a raw deal, *so they would sue.*

But that hasn't happened, and it isn't hard to see why. Apple is in no position to abuse app developers because Apple is not a monopolist. It controls only about a third of the American smartphone market. *See* Dominic Sunnebo, *Samsung Back to #1 in US, but Share is Down*, Kantar World Panel (Sept. 8, 2017), at https://perma.cc/4MUZ-C5NJ. Its market share would have to double for the iPhone even to approach qualifying as a monopoly product. *See* United States Department of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act: Chapter 2: Monopoly Power* (June 25, 2015), at https://perma.cc/6SFU-B9KG.

True, the plaintiffs claim that Apple wrongly monopolized not the market in smartphones, but the distribution for a market in iPhone apps. Yet unless Apple obtains monopoly power in the smartphone market, its decision to sell third-party apps only on a 30% commission and only through an App Store is no different from a corner grocer's decision to sell condiments only on a 30% commission and only on a certain shelf. A non-monopolist simply can't hurt competition in this way. At most, it can drive customers only to its competitors.

This lack of monopoly power incentivizes Apple to support robust app development. iPhones and iPhone apps are complementary goods. If apps become better, cheaper, and more plentiful, demand

for the iPhone increases. As MIT professors Andrew McAfee and Erik Brynjolfsson explain:

> The 'killer app' varies across potential iPhone customers. Some want games, some want business tools, some want to stream music while others want to make music, some want to use social media, some want to use their phones as small scientific instruments, and so on. The best way to discover these preferences, let alone to satisfy them, is to turn the App Store into something closer to an open marketplace than a store with a single owner.

Andrew McAfee & Erik Brynjolfsson, *Machine, Platform, Crowd: Harnessing Our Digital Future* 157 (2017). The more Apple encourages developers to create apps, the more apps will become available. The more apps available, the more iPhones Apple will sell. A proliferation of apps, McAfee and Brynjolfsson explain, "is exactly what Apple wants." *Id.* at 161.

In our extraordinarily innovative technology sector, fleeting monopolies on new inventions drive ever-increasing quality at ever-lower prices. *See* Richard A. Posner, *Antitrust Law* 249-50 (2d ed. 2001). Apple invented a massively beneficial new product. Rivals quickly piled into the market. Smartphone prices dropped and smartphone apps proliferated. As between app developers and app purchasers, the app developers benefit most if this process is efficient. And they stand to suffer most if it is exploitative. Their decision whether to sue

under the antitrust laws is consequential; it is a strong revealed preference. Their collective decision not to sue confirms that the distribution market for iPhone apps is efficient.

In sum, a handful of consumers have brought a meritless antitrust lawsuit against Apple. But *no* app developers have brought an antitrust lawsuit against Apple. The upshot is that the direct-purchaser rule works just as efficiently today as when this Court first articulated it four decades ago. That is, it opens the path for those with the most incentive to fulfill the purpose of the antitrust laws. And it shuts the door on those with the most incentive to use the antitrust laws to seek rents.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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